SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1075

SIDNEY C. KNIGHT, M. D.

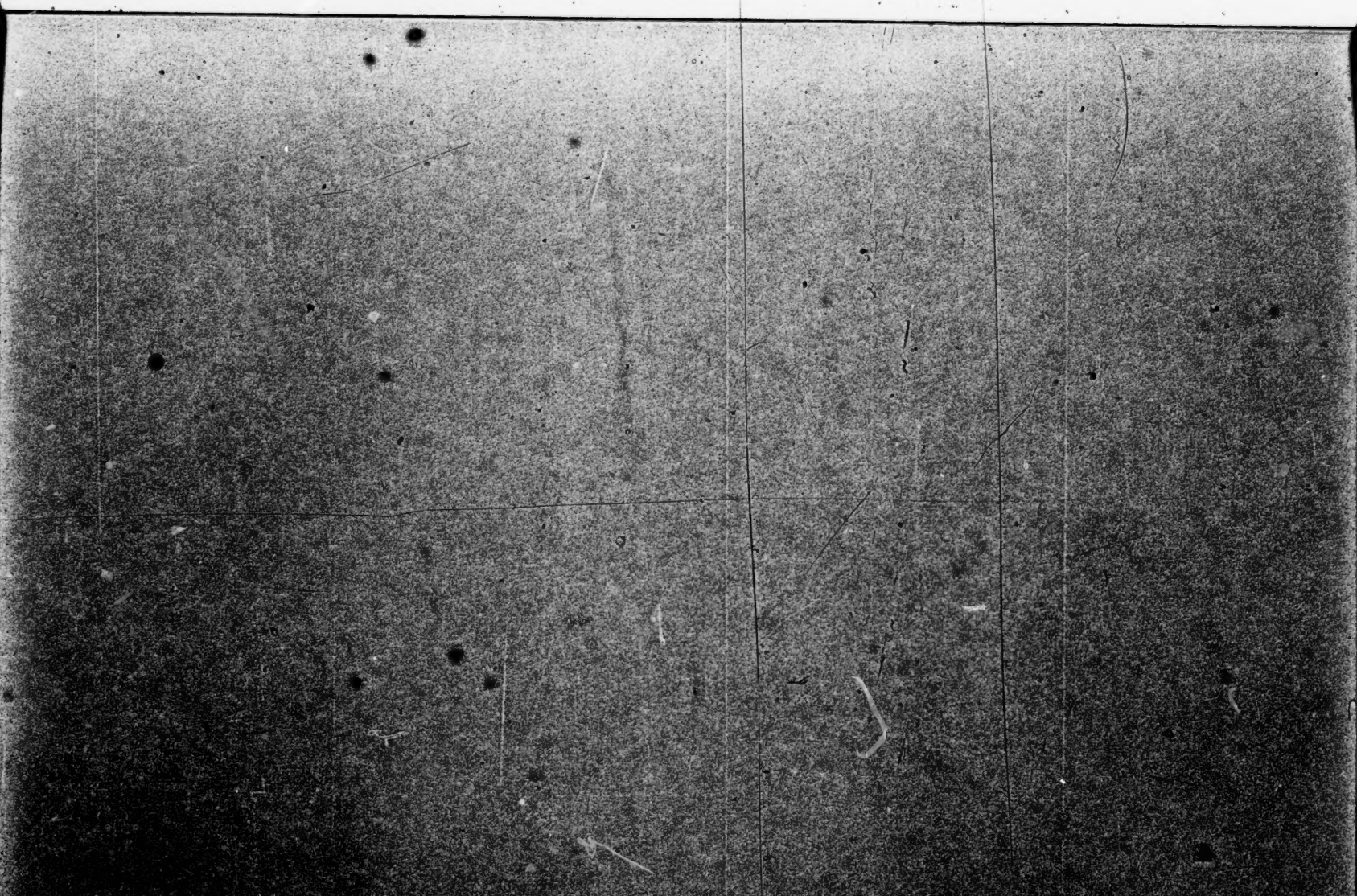
versus

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BENJAMIN E. SMITH
of
Smith, Scheuermann & Jones
305 Baronne Street
New Orleans, Louisiana 70112

DOUGLAS A. ALLEN
of
Allen & Mamoulides
3216 North Turnbull Drive
Metairie, Louisiana 70002
Attorneys for Petitioner



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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No.

SIDNEY C. KNIGHT, M. D.

versus

LOUISIANA STATE BOARD
OF MEDICAL EXAMINERS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioner prays that a writ of certiorari issue to review the judgment of The Supreme Court of The State of Louisiana entered in the above entitled case October 25th, 1968.

OPINIONS BELOW

Petitioner was denied a writ of mandamus by The Civil District Court in and for Orleans Parish Louisiana on April, 13, 1967. This decision was affirmed on appeal by The Fourth Circuit Court of Appeal on June 10th, 1968, and Re-hearing was denied July 1st, 1968. This decision is reported as *KNIGHT vs. LOUISIANA STATE BOARD OF MEDICAL EXAMINERS*, 211 So.

2d 433. Application was made for writs of review to The Louisiana State Supreme Court which were denied October 25, 1968. This is reported in 214 So.2d 716.

JURISDICTION

The jurisdiction of The Court is invoked pursuant to 28 USC §1257 (3). An application to this court for an extension of time in which to file this petition, up to and including February, 21, 1969 was granted January, 23rd, 1969 by Mr. Justice Black.

QUESTIONS PRESENTED

1. Does the holding of a hearing by a State Medical Board (wherein the license of a physician is suspended for 5 years) while criminal charges are pending against the physician, deprive him of due process of Law?

2. Does the suspension by a State Medical Board of a physician's license for 5 years based only upon the Board's evidence, and where the physician declines to testify because of pending criminal charges brought by the same Board deprive the physician of due process of Law?

3. Is a physician given a fair hearing and due process of Law when he is forced to either give evidence at an administrative hearing held by a State Medical Board to suspend his license or allow it to go by default when he stands under criminal charges brought by The Board,

on evidence procured by The Board, is to be prosecuted by a special prosecutor paid by The Board, and The Board rules that his failure to testify will be considered adversely to him?

4. Is a physician given a fair hearing and due process of law when a State Medical Board, sitting in judgment on the physician's license, is composed of at least two physician members who knew there existed reasonable medical evidence to show that the physician did not commit the abortion he stood accused of, and they did not disclose this evidence to the accused physician or to the other board members at the hearing;

5. Does a State Medical Practice Act which lists abortion as a ground for discipline (including Loss of License) of a physician, except after due consultation with another physician intrude upon the privacy of the patient-physician relationship and otherwise violate constitutional protections?

STATUTES AND REGULATIONS INVOLVED

1. AMENDMENT 5, CONSTITUTION OF THE UNITED STATES:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. AMENDMENT 14, CONSTITUTION OF THE UNITED STATES:
"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. LOUISIANA REVISED STATUTES TITLE 37 SECTION 1285 (1950 as amended):
"The board may refuse to issue, suspend, or institute proceedings in any court of competent jurisdiction to revoke any certificate issued under this part for any of the following causes:

(6) Procuring, aiding or abetting in procuring an abortion unless done for the relief of a wom-

an whose life appears in peril after due consultation with another licensed physician; or . . ."

4. LOUISIANA REVISED STATUTES TITLE 14 SECTION 87 (As amended Acts 1964, No. 167): "Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus:

(1) Administration of any drug, potion, or any other substance to a female; or

(2) Use of any instrument or any other means whatsoever on a female.

Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years.

STATEMENT OF THE CASE

Petitioner, a Physician in Jefferson Parish, Louisiana, was arrested on March 23rd, 1965, and formally charged with the Crime of Abortion (Title 14, Section 87, Louisiana Revised Statutes, as amended 1950. While awaiting trial on this criminal charge, which is a felony in Louisiana, the Louisiana State Board of Medical Examiners notified him of a Board hearing which would be held on May 1, 1965;

"on your moral and professional conduct; moral and professional competence; your alleged

> procuring, aiding or abetting and procuring one or more abortions or attempting same; prescribing of habit forming drugs in other than a legal and legitimate manner."[1]

On March 26, March 31, and April 1, 1965, a preliminary hearing was held in the Criminal Court of the 24th Judicial District Court on the charge of abortion against Dr. Knight. An attorney employed by the Sheriff and paid by the respondent Board appeared as Special Prosecutor in the preliminary hearing, and conducted the State's case against Dr. Knight. He later conducted the State's case in the trial of the criminal charge, where Dr. Knight was acquitted. This lawyer's services in this matter were employed and again paid for by the respondent Board and he assisted the counsel of the Louisiana State Board of Medical Examiners.

Dr. Knight, through his attorneys, requested that the hearing of the Board be postponed to a later date, because of the pending criminal charges filed against him in Jefferson Parish. This request was denied.

Dr. Knight's attorneys, then requested clarification of the "notice" he had received relative to the Board hearing, and he was told by telephone that the hearing would be limited to "those matters arising out of Dr. Knight's arrest on March 22 or 23".

The hearing of the Board was convened on May 1, 1965, and Dr. Knight, through advice of counsel, refused

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[1]Appendix p. 213

to testify because of possible self-incrimination. One of his attorneys again requested clarification of the charges and he was denied.

On May 5, 1965, Dr. Knight received a letter from the Board advising him that his license had been suspended for five years.

On May 19, 1966, Dr. Knight was tried before a jury in Criminal Court and found Not Guilty of the criminal charge of abortion previously filed.

Dr. Knight then applied to the Board for reinstatement of his license. His application was denied by the Board and Dr. Knight brought a civil action by which he sought, through mandamus or an alternate remedy, to have his license reinstated. Upon the trial of this case below it was learned that:

1. In January, 1965, one Charmaine Marthet, a pregnant female, contacted the respondent Medical Board and was referred to the private detective agency retained by the Board to investigate this petitioner. This agency, working with the Board and the Local Sheriff, allege[3] to have attempted to discourage her plans for an abortion.[4] This did not succeed and the sheriff then determined to use her in a plan to expose the respondent as he and the Board saw fit. This lady had been previously known to the Board as a witness against Dr. Knight when she had in December, 1964, first made,

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[3]R. p. 182
[4]P. p. 183

and then repudiated, a charge of abortion against him. It was upon these circumstances that the Board in January, 1965, failed to renew his license for that year although the respondent had tendered the fee and requested the usual re-issue.

2. Thus in the period, January-May, 1965, the respondent practiced with a suspended license more or less upon notice that his Board had him under investigation.

3. In early March, 1965, one or more Board members, one of the detectives employed by a detective agency retained by the defendant Board, and Charmaine Marthet (who was a convicted prostitute), agreed to a plan in which, in order to gather evidence against Dr. Knight, Marthet would ask the respondent to perform an abortion upon her, and, if he agreed, she would actually undergo the abortion. (Appendix p. 376).

4. One Cefalu, the Board's detective, took charge of the arrangements. He took her to get the tests necessary to establish pregnancy, to the sheriff's office in Jefferson Parish, and to a doctor to be examined before taking her to Dr. Knight's office. He gave her money to pay for the intended abortion (which she did not use) and he arranged for a baby sitter for her on the day of the intended abortion. Dr. Lyons (a Board Member) later made arrangements to have her admitted to Southern Baptist Hospital, as his special patient. (T.p.394).

5. On March 22, 1965, pursuant to this plan, Marthet entered the office of Dr. Knight. When she left the office, she told Cefalu and waiting sheriff's officers, that Dr. Knight had performed an abortion on her. (T.p. 111).

6. She was then re-examined by the same physician who saw her before she went to Dr. Knight's office, who reported a dilation of the cervix; (T.p. 191).

7. On March 23, 1965, on Marthet's complaint, Dr. Knight was arrested by the sheriff of Jefferson Parish and formally charged with the crime of abortion.

8. On March 23rd, Mrs. Marthet commenced to bleed, was placed in a hospital, was out on March 31st to testify at the preliminary hearing and did not go back in until April 3rd, which left three days unaccounted for. On April 6th, she delivered a dead male fetus. (T.p. 140).

9. Said fetus had been eviscerated terminating life, probably by instrumentation; was red in color and had not lived longer than 72 hours thereafter. (T.p. 477).

10. All of this was known by The Chairman of the Board and one other member at the time of the May 5th meeting, but was not then disclosed either to the other members of the Board or to the physician under examination and in jeopardy. (T. p. 448 through 461).

After the trial on the merits, the trial court rendered

judgment recalling and denying the writ of mandamus and injunction dismissing petitioner's suit.

On appeal by petitioner, the Fourth Circuit Court of Appeal affirmed the judgment of the trial court, and rehearing was denied, the Louisiana State Supreme Court refused review, and now petitioner seeks review by this Court.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DENIED DUE PROCESS OF LAW

A) PETITIONER SHOULD NOT HAVE BEEN CALLED UPON TO TESTIFY BEFORE THE BOARD WHILE UNDER CRIMINAL CHARGES.

In the beginning of the respondent Board's investigation of Dr. Knight, it could have chosen to either prosecute him criminally under the existing Louisiana Abortion Statute (LSA-RS 14: Section 87, 1950 as amended), or to exercise the sanctions of the Medical Practice Act and discipline him and suspend his license as a physician, (LSA-RS, Title 37, Section 1285). Alternatively, of course, they could have done as they did, pursue both courses of action at the same time. This latter course of action, taken by the Board, is what this petitioner is complaining about. This court had a similar situation before it in *Garrity Vs. State of New Jersey*, 385 US 493 (1967) where the police officer defendants did not refuse to testify before the At-

torney General and their answers were later used by the State to convict them of crime. Here Doctor Knight refused to testify and his refusal was used to suspend his license. This is the opposite side of the *Garrity* coin. Either Doctor Knight could have testified and allowed the Board-paid prosecutor to discover his defense in the criminal trial then pending, or he could have done as he did, refuse to testify and lose his license. He was, in short, presented by the Board with a Hobson's Choice. Surely this meets the "substantial" test of *Cohen vs. Hurley*, 366 US 117, (1961) (at 129). Doctor Knight was not just "discouraged" from giving testimony by the looming trial, he was severely threatened by the Chairman of the Medical Board that refusal to testify would result in "a serious disappointment" by the Board.[5] Thus, if he did testify he might go to jail; if he did not, his professional standing was in serious danger. The meaning of the Chairman was clear to the Doctor; he could testify or so "disappoint" The Board that they would have no choice but to suspend him.

As Mr. Justice Harlan writes in *Cohen* at p. 126 and 127, the choice is even difficult for the State.[6] But the State cannot refuse to choose, since to pursue *both* the criminal and administrative remedies at the same time presents the defendant with a dilemma that cannot be constitutionally resolved. *Chambers Vs. State of Florida*, 309 US 227, 60 S. Ct. 472, 84 L. Ed. 716; *Blackburn Vs. State of Alabama*, 361 US 199, 206, 80 S. Ct. 272 4,

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[5]Appendix p. 21

[6]*Cohen vs. Hurley* (Supra) at p. 8.

L. Ed. 2d 242; *Leyra Vs. Denno,* 347 US 556, 74 S. Ct. 716, 98 L. Ed. 2d 948; *Haynes Vs. State of Washington,* 373 US 503, 83 S. Ct. 625, 17 L. Ed. 2d, 574. See also relative to coercion, *Miranda Vs. State of Arizona,* 384 US 436, 464-465, 86 S. Ct. 1602, 1623, 16 L. Ed. 2d 694. *Garrity Vs. State of New Jersey* (Supra).

"Where the choice is between the rock and the whirlpool, duress is inherent in deciding to 'waive' one or the other" *Union Pacific RR Co. vs. Public Service Comm.,* 284 US 67, 69-70, 39 S. Ct. 24, 25, 63 L. Ed. 131. See also *Stevens vs. Marks,* 383 US 234, 243-244, 86 S. Ct. 788, 793, and *Frost Trucking Co. Vs. Railroad Commissioners,* 271 US 583, 46 S. Ct. 605, 607, 70 L. Ed. 101.

Here the petitioner did not, as did the police officers in *Garrity* (Supra) succumb to compulsion, but as a consequence, (although he was later acquitted), he lost his license. This is just as much a watering down of the Fifth Amendment protection as the dissenters of this court have recognized in *Cohen Vs. Hurley,* 366 US 117, 81 S.Ct. 954 (1961), *Nelson Vs. County of Fla.,* 362 US 1, 80 S. Ct. 527 (1960), *Beilan Vs. Board of Ed. (Phila),* 357 US 399, 78 S. Ct. 1317 (1958), and *Lerner vs. Casey,* 357 US 468, 78 S. Ct. 1311(1958).

To put it as the obverse of *Garrity,* the State cannot, contrary to the Fourteenth Amendment,[7] use the

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[7]See *Malloy Vs. Hogan,* 378 US 1, 84 S. Ct. 1489, 12 L. Ed 2d 653, and *Spevack vs. Klein,* 385 US 311, 87 S. Ct. 625, 17 L. Ed 2d 574, overruling *Cohen vs. Hurley* (Supra) as to exemption of Members of the Bar from immunity Statutes. Louisiana has no immunity statute applicable here.

threat of jail to produce testimony before a State Board of Medical Examiners. That was what they were trying to do here, and it violates essential concepts of due process.

The Louisiana Board was very plain about this Doctor's Dilemma. Respondent's Counsel stated:

> MR. ZACCARIA:
> "If I may enlarge upon that in order to keep the record straight, it is not only because of the constitutional right afforded Dr. Knight because of the precarious position he may be in in Jefferson Parish facing criminal charges, but this also relates back to my earlier arguments about lack of notice. We may permit Dr. Knight to testify before this hearing is over, regardless of the impliçations in Gretna, but until we know, until we know what these allegations are and who are making them against him, I do not feel that it is basically fair to ask Dr. Knight to testify blindly."
>
> "This goes back to my original arguments. I just wanted to amplify our reasons for at this point asking Dr. Knight to not testify, under the Fifth Amendment, the fact that he might tend to incriminate himself. Thank you."

Doctor McMahon responded:

> THE CHAIRMAN:
> "Of course, that is Dr. Knight's privilege, but

> I must say that *the Board will be terribly disappointed if Dr. Knight doesn't,* because he is now appearing before five members of his own profession and for the purpose of determining certain medical facts, *and we will be terribly disappointed if Dr. Knight doesn't give this Board a full opportunity to hear his side of the controversy,* his own personal side outside of the legal factors, just from our own personal medical side of the problem." (emphasis added)

From this it is clear, the Doctor was being told that he had either to testify before the Board or lose his License. If he testified, he might well be handing the Board's special prosecutor all the evidence the jury would need to convict him of a felony. The language of *Spevak* (Supra) describes it better:

> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as 'the use of legal process to force from the lips of the accused individual the evidence necessary to convict him * * *.' *United States V. White,* 322 U.S. 694, 698, 64 S. Ct. 1248, 1251, 88 L. Ed. 1542. As we recently stated in *Miranda V. State of Arizona,* 384 U.S. 436, 461, 86 S. Ct. 1602, 1620, 16 L. Ed. 2d 694, 'In this Court, the privilege has consistently been accorded a liberal construction.' It is in that tra-

> dition that we overrule Cohen v. Hurley. We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words "No person ***** shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception. Like the school teacher in *Slochower v. Board of Higher Education of City of New York*, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692, and the policemen in *Garrity V. State of New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562,[3] lawyers also enjoy first class citizenship."

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[3]Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we did not reach.

Since the Board was in effect attempting a discovery proceeding in a criminal case, (a right not afforded The State in Louisiana) it becomes clear that when the Criminal Court Jury acquitted this petitioner it had lost its main thrust against him. Instead it chose to rely further on a hearing record where it was judge, jury, and prosecutor, and, where the defendant stood mute by necessity, as he was being deprived of his License.

This is an impermissable burden on the privilege. *In Re Gault*, 381 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, 559, (1962) *Thorp Vs. Housing Authority* 386 U.S. 670, 87 S. Ct. 1244, 18 L. Ed 2d 394, 400 (1967), *Haynes*

Vs. State Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513, (1963), *Culombe Vs. Connecticut,* 367 U.S. 568, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961), *Rogers Vs. Richmond,* 365 U.S. 534, 5 L. Ed. 2d 760, 81 S. Ct. 735, *Griffin Vs. California,* 380 U.S. 609, 14 L. Ed 2d 106, 85 S. Ct. 1229 (1965).

Finally, this court reached the inversion of *Garrity* (Supra) as posed by the facts of this case when it decided *Gardner vs. Broderick* _____U.S. _____, 88 S. Ct. 1913, _____L. Ed. 2d _____, (1968), and *Uniformed Sanitation Men Ass'n. Vs. Commissioner of Sanitation,* ____ U.S. ____, 88 S. Ct. 1917, ____ L. Ed. 2d _____, (1968). While in those cases the accused persons were discharged solely because they exercised the privilege, and here the Board took evidence, it is clear that the testimony received was the Board's testimony, from its own paid witnesses and elicited by its own counsel. In fact, part of the testimony related to a description of how The Chairman of The Board of Medical Examiners himself participated in the planning of the arrest of Dr. Knight, and in the latter treatment of the complaining witness, Mrs. Marthet, which he arranged for, after her alleged instrumention by petitioner.[8]

The real answer, however, as to how this case relates to *Broderick* and *The Sanitation Men's case* (Supra) is found in the remarks of The Chairman when the lawyers for Dr. Knight explained that he would exercise the privilege against self-incrimination.[9]

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[8]Appendix p. 448, through 451.
[9]op. cite. p. 10.

After this had been said in the beginning of the proceedings, there was very little Dr. Knight could offer in way of defense. The cross-examination conducted by his lawyers could hardly have been effective in the absence of his own testimony in contradiction of that offered by The Board. This is especially true since meaningful cross-examination of adverse witnesses can occur only in the context of contradictory evidence introduced as a base. In this case it was not there.

The conclusion that the recorded testimony forces upon the reader is that the Board Members had pretty well made up their minds after Dr. Knight plead the Fifth Amendment, and that what was left was the formal presentation of The Board's case. This was a performance bought and paid for by the examiners, which because of the pending felony trial, the accused Doctor could hardly dare to tamper with. With this assurance, the Board felt as free to suspend this physician as did The City of New York and its Sanitation Commissioner in *Broderick* and *Sanitation Men's Ass'n.* (Supra). The result should be the same as there; this defendant was suspended because he refused "to waive a right which the constitution guarantees to him".[10]

B) SIGNIFICANT EVIDENCE WAS WITHHELD FROM THE MEDICAL BOARD AT THE TIME OF THIS HEARING.

As to question No. Four, the Chairman and one other physician who were members of the Board, knew at

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[10] ***Gardner vs. Broderick*** **(Supra) at p. 1915 (S.Ct. Rep.)**

the time of the hearing that the dead fetus was delivered April 6th, 1965, 15 days after alleged abortion and that it exhibited characteristics which could reasonably lead a trained physician to conclude that the fetus had been killed by instrumentation within the 72 hours preceding its birth.[11] Nothing about this was said to the other Board Members or to Doctor Knight at the time of the Board hearing.[12]

The prosecutor owes a duty to the defendant in a criminal, as well as in an administrative hearing, to disclose all reasonable evidence of non-guilt. This is designed to meet his public obligation to seek punishment of those who appear to be guilty of crime, but also to protect those persons who may be innocent. The responsibility of a State Board armed with sanctions is first to the public, but also to those professionals within its jurisdiction. The suppression of such evidence is fatal to a due process prosecution. *United States Vs. Di-Re,* 322 U.S. 581, 68 S. Ct. 222, (1948), *Holland Vs. United States, 348* U. S. 121, 75 S. Ct. 127, (1955), *Bradey Vs. Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963), *Mooney Vs. Holohan,* 294 U.S. 103, 55 S. Ct. 340, (1935), *Pyle Vs. Kansas,* 317 U.S. 2B, 63 S. Ct. 177 (1942).

While some of the judges and accusers of this petitioner had knowledge of what happened to the alleged victim after her visit to petitioner's office 15 days prior to her delivery, he did not. Had he known, he would have been put on notice that such a defense was pos-

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[11]T.P. 472

[12]See entire record

sibly available and should be developed. Instead he was reduced to a fruitless cross-examination of adverse witnesses selected by the Medical Board. These facts raise a very serious question of due process. One cannot say with a certainty that the Board conspired to judge him in advance, or that another person or persons procured this abortion, but there cannot be much doubt that some members of The Board were not prepared for the full truth to be developed at the initial hearing.

The District Court and The Court of Appeals below (4th Circuit Louisiana) affirmed the findings of The Board of Medical Examiners as being based on "Substantial evidence" and as "not arbitrary or capricious".[13] However, where such Board findings are shown to be grounded on a short record, occasioned by withheld evidence that could reasonably lead to a different conclusion, then as a matter of law, due process is offended. Putting it another way, all the District Court and The Court of Appeals did was to judge the discretion of the Board. In doing so, it did not find an abuse. However, where the decision of The Board is tainted with a clear showing of important evidence being withheld, (and the record in The District Court clearly shows this),[14] then the Board cannot be given the usual weight afforded a finder of fact.

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[13]Appendix Part 3, p. 823

[14]Appendix Part One compared with Appendix Part Two.

II. THE STATE MEDICAL PRACTICE ACT IS UNCONSTITUTIONAL.

A) THE CHALLENGED STATUTE IS AN ARBITRARY INVASION OF THE RIGHT OF THE PHYSICIAN TO PRESCRIBE FOR HIS PATIENT IN ACCORDANCE WITH HIS BEST PROFESSIONAL KNOWLEDGE.

The State cannot restrict a licensed physician from freely prescribing the best care and from giving the best advice available to his patient. *United States V. One Package,* 86 F. 2d 737 (2d Cir. 1936); *Griswold V. Connecticut,* (Supra) at 381 U.S. 481; *United States V. Freund,* 290 Fed. 411 (D. Mont. 1923).[15]

In *United States V. One Package, (*Supra) the Court was considering the interpretation of a provision of the Comstock Act which prohibited the mailing of any item, the purpose of which was the "prevention of conception or for causing abortion," 19 U.S.C. 1305. It held in an opinion written by Judge Augustus N. Hand that this provision could not be interpreted as applicable to the licensed physician acting within the accepted medical practices of the day. It pointed out that it would be unreasonable to suppose that legislation was intended

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[15]Cf. the recent recognition that freedom of association is involved in professional-client relationships. *United Mine Workers v. Illinois State Bar,* 389 U.S. 217, 19 L. ed 2d 426, 88 S. Ct. 353 (1967); *NAACP v. Button,* 371 U.S. 415, 9L. ed 2d 405, 83 S. Ct. 328 (1963); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 12 L. ed 2d 89, 84 S. Ct. 113 (1964).

to prevent the supression of articles, "the use of which in many cases is advocated by such a weight of authority in the medical world" (pp. 739-740).

The physician's belief must coincide "with the average judgment of the doctors in the community in which he practices." *Commonwealth V. Wheeler,* 315 Mass. 394, 53 N.E. 2d 4 (1944). See Also *Commonwealth V. Brunelle,* 341 Mass. 673, 677, 171 N.E. 2d 850, 852 (1961).

B) THE CHALLENGED STATUTE IS AN ARBITRARY INVASION OF THE FUNDAMENTAL RIGHT OF A WOMAN TO DETERMINE WHEN TO BEAR OFFSPRING.

The challenged statute violates the private right of a woman to determine whether or not to bear a child by restricting her right to terminate a pregnancy, except, in the statute under consideration here ". . . a woman 'whose life appears in peril' ***". At the outset, it is established that the defendant-appellant here may challenge the statute as violative of the rights of his patients, as well as of his own. *Griswold V. Connecticut,* 381 U.S. 479, 481, 14 L. ed 2d 510, 85 S. Ct. 1678 (1965); *Barrows V. Jackson,* 346 U.S. 249, 257, 97 L. ed 1586, 73 S. Ct. 1031 (1952).

The fundamental right to determine whether to bear offspring should be within the scope of the increasing area of personal rights protected from unwarranted

state interference.[16] In the closely related area of the right of married persons to make this determination prior to conception by the use of contraceptives, the Supreme Court has struck down the Connecticut statute which forbade the dissemination of information and instruction as to the means of preventing conception, *Griswold V. Connecticut,* (Supra). The recognition in *Griswold* that there are fundamental rights not specifically enumerated in the Constitution, but demanding the same degree of protection against state interference with privacy carries forward to yet another area, the Court's recognition that non-enumerated rights are of equal importance constitutionally to those specifically set out in the Bill of Rights (381 U.S. at 484):

"The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe V. Ullman,* 367 U.S. 497, 516-522, 6 L. ed. 2d 989, 1003-1007, 81 S. Ct. 1752 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against

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[16] *Cox, Constitution Adjudication and the Promotion of Human Rights,* 80 Harv. L.R. 91 (1966):

> "Today the political theory which acknowledges the duty of government to provide jobs, social security, medical care and housing extends to the field of human rights and imposes an obligation to promote liberty, equality and dignity. For a decade and a half, the recognition of this duty has been the most creative force in Constitutional law."

the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'. The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be contrued to deny or disparage others retained by the people.'

"The Fourth and Fifth Amendments were described in *Boyd v. United States,* 116 U.S. 616, 630, 29 L. ed 746, 751, 6 S. Ct. 524, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp V. Ohio,* 367 U.S. 643, 656 6L. ed 2d 1081, 1090, 81 S. Ct. 1684, 84 ALR 2d 933, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.' See *Beaney, The Constitutional Right to Privacy,* 1962 Sup Ct. Rev. 212; Griswold, *The Right to be Let Alone,* 55 NY LR Rev. 216 (1960).

"We have had many controversies over these penumbral rights of 'privacy and repose.' (Citing cases) These cases bear witness that the right of privacy which presses for recognition here is a legitimate one."

C) THERE IS NO COMPELLING STATE INTEREST SUFFICIENTLY STRONG TO JUSTIFY THE PROHIBITION OF ABORTION BY A LICENSED PHYSICIAN ON A WOMAN WHO DESIRES THE ABORTION.

The strength, depth and significance of the personal right of the woman and the professional right of the doctor drastically curtailed by the abortion law far outweigh the alleged value to society adverted to in support of the abortion law.

The principle applicable to the examination of this statute has been stated by the United States Supreme Court in *Bates V. Little Rock,* 361 U.S. 516, 524, 4 L. ed. 2d 480, 80 S. Ct. 412 (1960):

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (Citing Cases)

See also *NAACP V. Button,* (Supra) at p. 421.

Can any asserted compelling state interest in the present statute survive scrutiny? The abortion statutes in the form that they now appear Article 87 (Title 14, as amended) and in most states to the contrary, had their origin in the social attitude of mid-Victorian morality prevalent in the second half of the nineteenth century, during which these laws were passed. Common law was not so strict, since it viewed abor-

tions as illegal only after quickening, which occurs only after the first trimester. The alleged sovereign interest in preventing abortions prior to quickening is a relatively recent development in western history and in Anglo-American law,[17] and can hardly be said to have been recognized universally in our civilization or since ancient time.[18]

One asserted interest of the state is a concern with preserving the health of the woman because of the medical dangers of abortion. Whatever may have been the medical facts at the time of the passage of the law, there is no evidence on which a present-day finding could justifiably be made that abortion by a licensed physician constitutes a grave, or indeed any, danger to health. It has been repeatedly established that abortions performed by licensed physicians under appropriate conditions constitute as little danger to health as a minor operation. Certainly there is no danger[19] of the dimension which would justify the almost total infringement of individual liberty incident to the present prohibitions.

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[17]See, for summaries of the history of abortion in Western and Anglo-Saxon law: Commentary on Draft No. 9 of the Model Penal Code, footnote 12, p. 148; Williams, *The Law of Abortion*, 5 Current Legal Problems 128 (1952).

[18]The view embodied in the abortion laws of the United States is hardly a world-wide view. Many other countries of the world permit abortions at will; even more, on very broad grounds. See Roemer, *Abortion Law; The Approaches of Different Nations*, 57 American Journal of Public Health 1906.

[19]Hardin, Garrett: *Blueprints, DNA and Abortion: A Scientific and Ethical Analysis*, 32 Medical Opinion and Review 74.

This statute is indeed an example of over-breadth, for even recognizedly necessary state regulation must not be unnecessarily broad and thereby invade areas of protected freedoms. *Aptheker V. Secretary of State,* 378 U.S. 500, 514, 12 L. ed 992, 1001, 84 S. Ct. 1659; *NAACP V. Alabama,* 377 U.S. 288, 307-308, 12 L. ed 325, 338, 84 S. Ct. 1302; *McLaughlin V. Florida,* 379 U.S. 184, 13 L. ed 222, 85 S. Ct. 283 (1964); *Griswold V. Connecticut* (Supra) 381 U.S. at 498.

D) THE STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ON ITS FACE AND IN ITS APPLICATION.

The Louisiana Medical Practice Act involved in this action is invalid on its face as against anyone outside its protected class (of women for whom an abortion is necessary to preserve life) because the legislative classification cannot be supported as justifiable in the light of a legitimate legislative interest. The statute therefore violates the equal protection clause of the Fourteenth Amendment. Although in recent years the clause has been utilized most often with respect to racial discrimination, the equal protection clause is available for protection against irrational discrimination in any form.[20] And, in determining whether the discrimi-

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[20]See e.g., *Griffin v. Illinois,* 351 U.S. 12, 100 L. ed 891, 76 S. Ct. 585 (1956); *Douglas v. California,* 372 U.S. 353, 9 L. ed 2d 811, 83 S. Ct. 814 (1963); *Long v. District Court,* 385 U.S. 192, 17 L. ed 2d 290, 87 S. Ct. 362 (1966); *Reynolds v. Sims,* 377 U.S. 533, 12 L. ed 2d 506, 84 S. Ct. 1362 (1964); *Lucas v. Forty-*

nation is irrational, the Court will ensure, as stated in *Levy V. Louisiana,* 391 U.S. 68, 20 L. ed 2d 436, 88 S. Ct. 1509, L. Ed at 469 (1968), that the sensitive area of civil rights receives priority in the constitutional scheme when weighed against an asserted state interest, no matter how long-standing and traditional.

The concept of equal protection is not a static one and a challenged statute must be examined in light of current knowledge. As the Supreme Court of the United States said in *Harper V. Virginia State Board of Elections,* 383 U.S. 663, 16 L. ed 2d 169, 86 S. Ct. 1079, at 383 U.S. 669, et seq.:

"We agree, of course, with Mr. Justice Holmes that Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics' . . . Likewise, The Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy V. Hogan,* 378 U.S. 1, 5-6."

"Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This Court in 1896 held that laws providing for separate pub-

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Fourth General Assembly, 377 U.S. 713, 12 L. ed 2d 632, 84 S. Ct. 1472 (1964); *Carrington v. Rash,* 380 U.S. 89, 13 L. ed 2d 675, 85 S. Ct. 775 (1964); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 16 L. ed 2d 169, 36 S. Ct. 1079 (1966).

lic facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands . . . . . Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When in 1954 — more than a half-century later — we repudiated the 'separate-but-equal' doctrine of *Plessy* as respects public education we stated:

'In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy V. Ferguson was written.' "

The lack of justification is accentuated by the demonstrated social fact that the actual application of the abortion law is wholly discriminatory in favor of the rich and mobile and against the poor and depressed. The United States Supreme Court is increasingly developing the thesis that the equal protection clause requires equality for rich and poor. It has applied this principle in decisions dealing with elections and representation in the Legislature (*Gray V. Sanders,* 372 U.S. 368, 9 L. ed 821, 83 S. Ct. 801 (1963); *Westberry V. Sanders,* 376 U.S. 1, 11 L. ed. 2d 481, 84 S. Ct. 526 (1964); *Reynolds V. Simms,* 377 U.S. 533, 12 L. ed. 2d 506, 84 S. Ct. 1362 (1964); to invalidate the requirement of a poll tax as a prerequisite to voting *(Harper V. Virginia Board of Elections,* (Supra) at 663) in imposing the obligation to supply counsel at public expense to paupers charged with serious crimes *(Gideon V. Wainwright,* 372 U.S. 335, 9 L. ed. 2d 799, 83 S. Ct. 792

(1963)), and in requiring the state to furnish a transcript on appeal to indigent defendant (*Griffin V. Illinois,* 351 U.S. 12, 100 L. ed 891, 76 S. Ct. 585 (1956)). This court may properly examine the sociological effect of the actual operation of a statute in determining its constitutional validity. *Brown V. Board of Education,* 347 U.S. 483, at p. 492, 98 L. ed 873, 74 S. Ct. 686 (1954).

E.) THE STATUTE IS A LAW RESPECTING AN ESTABLISHMENT OF RELIGIONS IN VIOLATION OF THE CONSTITUTION BECAUSE THE PRIMARY PURPOSE OR EFFECT IS THE ADVANCEMENT OF A RELIGIOUS DOGMA.

The most recent pronouncement of the Supreme Court of the United States has reiterated the proposition that if the purpose or primary effect of the enactment is the advancement or institution of a religious dogma, then the enactment exceeds the scope of legislative power. *Epperson V. Arkansas,* ____ U.S. ____, 89 Sup. Ct. 266, ____ L.Ed. 2d ____ (1968). In that case the Court held that the Arkansas Statute, which whether it prohibited mention of Darwin's theory or only forbade teaching of it, was unconstitutional because of its conflict with the prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The Court said:

"Government in our democracy, state and na-

> tional must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." 89 Sup.Ct., at 270.

Prior to *Epperson,* in *Abington School District v. Schempp,* 374 U.S. 203, 10 L. ed 2d 844, 83 S. Ct. 1560 (1963), the Court reviewed the foregoing cases and drew from them the governing standard:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education* (supra) . . . . *McGowan v. Maryland* (supra)." 374 U.S. at 222.

The foregoing cases are the most notable recent expositions of the proposition advanced by an eminent authority that.

> "Contemporary constitutional doctrine may suggest yet another, related difficulty about obscenity and other morality laws. For the morality that these laws would protect can trace a discernible path back to origins in religious authority. Can government, which may not establish religion, or interfere with the free exercise of religion and non-religion, enforce a morality rooted in religion? Is legislation the sole or chief purpose of which the preservation of a quasi-religious morality, consistent with the separation of Church and State now recognized as the law of the Constitution."[21]

The crucial question under the *Epperson and Abington* doctrines then is whether the purpose or primary effect of the state abortion laws at the present time is the advancement or inhibition of religion, or of general social interests which demand the pervasive state regulation. We have discussed above the various other purported state interests which have been mentioned as being the primary purpose of the laws and shown that there is indeed no substantive state interest of sufficient consequence to justify the regulation. What appears to be a primary justification advanced for the present laws is a religious and not a secular one and, therefore, cannot be relied upon to validate what is in effect the legislation of a religious philosophy. There is a very substantial evidence that the present maintenance of the abortion laws is based upon the current

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[21]Henken, *Morals and The Constitution: The Sin of Obscenity,* 63 Col. Law Rev. 391, 407, 410 (1963).

religious position of particular church groups, that the laws are required to protect the life of the fetus, which these groups maintain, arises at the moment of conception. The primary organized opposition to reforming abortion legislation comes from these particular religious groups and the form of the opposition is a restatement of theological doctrine.[22]

CONCLUSION

Wherefore, it is respectively requested that the Writ of Certiorari herein prayed for be granted and that this court review the decision below and reverse the action suspending petitioner's license or remand the matter to the Supreme Court of the State of Louisiana with an order directing them to review this record in light of the points herein raised.

Respectfully submitted

Benjamin E. Smith
Smith, Scheuermann & Jones
1006 Baronne Building
New Orleans, Louisiana, 70112
Telephone 525-4361

22Leavy, Zad and Kummer, Jerome M., *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 Ohio State Law Journal, 647 at 659, et seq. (1966).

CERTIFICATE

I, Benjamin E. Smith, counsel of record for the petitioner, certify that a copy of this application has been served by United States Mail on Mr. Thomas J. Wyllie, counsel for the Louisiana State Board of Medical Examiners, this _____ day of February, 1969.

BENJAMIN E. SMITH